Millwrights, Piledrivers, Divers, Highway Construction, AFL–CIO, Local Union No. 1026, affiliated with the International Brotherhood of Carpenters and Journeymen of America, AFL–CIO *and* Intercounty Construction Corporation of Florida, Inc.[1] Case 12–CD–298(1–2)

7 July 1983

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following charges filed by Intercounty Construction Corporation of Florida, Inc., herein called the Employer, alleging that Millwrights, Piledrivers, Divers, Highway Construction, AFL–CIO, Local Union No. 1026, affiliated with the International Brotherhood of Carpenters and Journeymen of America, AFL–CIO, herein called Piledrivers, violated Section 8(b)(4)(i) and (ii)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employer to assign certain work to employees represented by Piledrivers rather than to its unrepresented employees.

Pursuant to notice, a hearing was held before Hearing Officer David Weitzner on 16 December 1982. All parties appeared at the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues.[2] Thereafter, the Employer filed a brief which has been duly considered.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this case, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

The record discloses, and we find, that Intercounty Construction Corporation of Florida, Inc., a Florida corporation with its principal place of business in Ft. Lauderdale, Florida, is engaged in heavy construction, specializing in water and sewage treatment plants, pipelines, and marine work. During the 12 months preceding the hearing in this case, a representative period, the Employer, in the course and conduct of its business operations, purchased and received building materials valued in excess of $50,000 which were shipped for use in its operations in the State of Florida directly from points located outside the State of Florida.

Based on the foregoing, we find that Intercounty Construction Corporation of Florida, Inc., is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Since Piledrivers did not stipulate to its status as a labor organization, we take official notice of the recent decision in *Carpenters IBC Local 1026 (McKinney Drilling)*, 264 NLRB 261 (1982), in which the parties stipulated, and the Board found, that Piledrivers is a labor organization as defined by the Act. Accordingly, we conclude that Piledrivers has been and is now a labor organization within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *Background and Facts of the Dispute*

In early 1982,[3] the Employer entered into five separate contracts with the city of Ft. Lauderdale to perform certain work relating to the expansion of the George T. Lohmeyer Waste Water Treatment Plant. This project is of critical importance to the city of Ft. Lauderdale because its present sewage treatment facilities are inadequate. Accordingly, it has instituted a building moratorium until work on the Lohmeyer project is completed. For this reason, there are provisions in the Employer's contract calling for $50,000 in liquidated damages for each day that the Employer is late in completing its work.

The Employer presently is engaged in constructing the pre-treatment building and the effluent pump station at the Lohmeyer jobsite. The pretreatment facility is designed to remove heavy debris, such as grit, sand, bottles, and rocks, from sewage entering the plant. To implement this operation, the Employer is installing grit collectors that will absorb these settlement items so that raw sewage can be treated in other parts of the facility. Upon completing the various treatment processes, the sewage enters the effluent pump station where

[1] The Employer's name appears as amended at the hearing.

[2] Counsel for Piledrivers appeared at the hearing solely for the purpose of moving to quash the notice of hearing issued herein. He thereafter left the hearing, which continued without counsel for Piledrivers or any other representative of Piledrivers being present. The arguments raised by counsel's motion to quash are fully discussed below.

[3] All dates are in 1982 unless otherwise indicated.

it is pumped into underground wells for eventual disposal in the Atlantic Ocean.

The construction of both facilities requires the installation of connecting pieces of steel sheeting to form temporary restraining walls around the excavation sites. The Employer has assigned that portion of the steel sheeting work in dispute here to its unrepresented employees. After trucks deliver the steel sheeting to the jobsite, these employees unload and stack the materials. An employee represented by Operating Engineers operates the crane that hoists the steel sheeting into position along the perimeter of the excavation site. The unrepresented workers then connect the pieces of steel sheeting before an Operating Engineers-represented employee drives them into the ground to a specified depth. Upon completion of the structure, the crane is used to extract the steel sheeting from the ground. These materials then are cleaned, trimmed, and loaded on trucks by the Employer's unrepresented employees. Under the terms of its contracts with the city of Ft. Lauderdale, the Employer also is installing about 300 linear feet of temporary steel sheeting in similar fashion to protect the existing utilities and roadway situated near the pre-treatment facility site.

The Employer's unrepresented employees also have been assigned all the disputed carpentry work involved in constructing the pre-treatment building and effluent pump station. After lumber is delivered to the jobsite, these employees cut the wood to fit the structure under construction. Next, they nail together the pieces of wood in erecting forms for the placement of concrete. When the concrete has hardened, these forms are dismantled, cleaned, and stacked for reuse on other projects.

Upon learning that the Employer was a successful bidder on the Lohmeyer project, William Trepani, Piledrivers business manager, contacted the Employer's representatives to discuss the possibility of formulating a three-union contract with the Employer encompassing Piledrivers, Operating Engineers, and Laborers. Trepani had proposed that these Unions join forces to ensure that virtually all the work on the project would be performed by union employees. Although three or four meetings were subsequently held on this subject, the parties were unable to reach such an agreement.

Thereafter, in late October 1982, Trepani arranged a meeting where he advised the Employer that he now was concerned with getting work for Piledrivers-represented employees. When Trepani asked how many of these employees the Employer intended to hire on the Lohmeyer project, Leslie Koehler, the Employer's vice president, responded that the Employer presently had enough employees to perform all the work required by its operations there. Koehler further stated that the Employer would review the situation as the project progressed. Trepani then stormed out of the meeting, saying that the Employer would be hearing from him.

After the Employer commenced its work at the jobsite, Trepani visited the Lohmeyer project on 17 November. He asked Al Buchiere, one of the Employer's employees, who would be performing the steel sheeting work there. When Buchiere replied that the Employer's employees would handle that work, Trepani threatened to picket the jobsite the following day. The next day, as Trepani had threatened, there were 25 to 35 pickets on the jobsite. The pickets wore signs that read, "Intercounty Construction Lowers My Standard of Living, Local 1026." As a result of this action 3 of the Employer's 11 employees represented by Operating Engineers refused to work that day. The picketing continued each day until 7 December.

While Piledrivers was picketing the Employer, Andrew Wells, its assistant business agent, went to the Employer's offices on 24 November. He asked Mike Marinelli, the Employer's president, whether he would permit some employees represented by Piledrivers to perform the steel sheeting and carpentry work. Koehler then joined the discussion and told Wells that he could not put Piledrivers-represented employees to work immediately because that would mean laying off the Employer's permanent employees.

B. *The Work in Dispute*

No party contests the following description of the work in dispute set forth in the revised notice of hearing:

> All the steel sheeting work, including the receiving, unloading, driving, pulling, cleaning, stacking, and reloading of steel sheeting onto trucks for removal of the steel sheeting from the jobsite, and all the form carpentry work, including the receiving and cutting of lumber, assembling and fabricating of forms, erecting forms after concrete has hardened, and [all] associated laborers' work connected with the completion of the foregoing work tasks, at the George T. Lohmeyer Waste Water Treatment Plant jobsites located on Eisenhower Boulevard and on Cordova Road in Ft. Lauderdale, Florida.

C. *The Contentions of the Parties*

Piledrivers made a motion at the outset of the hearing to quash the notice of hearing for the fol-

lowing reasons: (1) the Board's failure to conduct adversary hearings in Section 10(k) cases is a denial of due process; (2) no jurisdictional work issue is raised here because the dispute does not involve two labor organizations; (3) the Board's method of deciding jurisdictional disputes is a "sham" because the Board automatically "rubber-stamps" the Employer's work assignment; (4) the Employer in this case is a "rat contractor" who is violating provisions of the Davis-Bacon Act; (5) there is no reasonable cause to believe that Piledrivers violated Section 8(b)(4)(D) of the Act since the picketing was for recognitional purposes. However, in the event that the Board does decide to make a determination of this dispute, Piledrivers apparently takes no position as to which competing group of employees should be awarded the disputed work.

According to the Employer, Piledrivers violated Section 8(b)(4)(D) of the Act when it made threatening remarks at the Lohmeyer jobsite and then picketed there for a proscribed purpose. The Employer urges that an award of the disputed work to its unrepresented employees is appropriate based upon the Employer's present assignment and past practice, area practice, and efficiency and economy of the Employer's operations. The Employer also contends that there is a real possibility that this dispute will continue to recur at its jobsites unless the Board makes "the broadest possible" award of the disputed work.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must be satisfied that: (1) there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, and (2) there is no agreed-upon method for the voluntary resolution of the dispute.

With respect to (1) above, the record shows that, in late October 1982, the Piledrivers business manager, William Trepani, asked the Employer to assign some of its work on the Lohmeyer project to employees represented by Piledrivers. Thereafter, on 17 November 1982 Trepani threatened to picket that jobsite after being informed that the Employer's unrepresented employees would be performing the steel sheeting work there. The next day Piledrivers commenced picketing the project. During the 3 weeks' duration of its picketing, Piledrivers specifically requested that the Employer reassign its steel sheeting and carpentry work to employees represented by it. Based on the timing of the picketing and Piledrivers repeated demands that the Employer alter its work assignments on the Lohmeyer project, we conclude that there is reasonable cause to believe that an object of Piledrivers picketing was to force the Employer to assign the disputed work to employees represented by Piledrivers. Accordingly, without ruling on the credibility of the testimony at issue, we find that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated.

Thus, we deny as lacking in merit the motion made by Piledrivers at the hearing to quash the notice of hearing. In doing so, we reject its argument that the Board's procedure for conducting hearings under Section 10(k) of the Act is a denial of due process. It is well settled that in the context of a jurisdictional dispute the Board is not charged with finding that a violation did, in fact, occur, but only that reasonable cause exists for finding such a violation.[4] Since a conflict in testimony does not prevent the Board from proceeding under this standard, there is no need to hold an adversary hearing in resolving these disputes.[5] We also find no merit to Piledrivers contention that the Act contemplates only jurisdictional disputes between rival unions and thus Piledrivers conduct here, because the Employer's employees are unrepresented, should not be found to be proscribed by Section 8(b)(4)(D) of the Act. As the Board stated in *Communications Workers District 8 (Mountain States)*, 118 NLRB 1104, 1107 (1957), "It does not matter that the 'dispute' is not between two unions; for one union to require the Employer to assign work to its members rather than to employees who are not members of any union is proscribed." In its motion, Piledrivers further argues that proceedings under Section 10(k) are meaningless since the Board automatically follows the employer's work assignment. It is clear from the Board's many previous decisions in cases involving work disputes, however, that the employer's preference for assigning the disputed work to a particular group of employees is only one factor that the Board considers in its work award. As an employer often looks to a number of the same factors that the Board utilizes in making its Section 10(k) determinations, it is understandable that the employer's preference and the Board's award of work often coincide. Piledrivers further urges that the notice of hearing be quashed on the ground that the Employer is failing to meet requirements of the Davis-Bacon Act. The record in this case, however, discloses no evidence of any such violations on the Lohmeyer project. Moreover, even assuming that there have been such violations, we do not see nor has Piledrivers explained why that would be relevant to the issues raised

[4] See, e.g., *Laborers Local 334 (Heist Corp.)*, 175 NLRB 608, 609 (1969).

[5] Accord: *Longshoremen ILWU Local 8 (General Ore)*, 124 NLRB 626, 628 (1959).

here. Finally, since we have found that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, Piledrivers argument that its picketing was solely for recognitional purposes also is lacking in merit. The Board has held that, even where the evidence tended to show that the picketing was not solely for purposes proscribed by the Act, "[o]ne proscribed object is sufficient to bring a union's conduct within the ambit of Section 8(b)(4)(D)."[6]

Further, there is no evidence in the record and no party contends that an agreed-upon method exists for the voluntary resolution of this dispute. We therefore find that the dispute is properly before the Board for determination under Section 10(k) of the Act.

E. *Merits of the Dispute*

Section 10(k) of the Act requires that the Board make an affirmative award of the disputed work after giving due consideration to various relevant factors.[7] As the Board frequently has stated, the determination in a jurisdictional dispute case is an act of judgment based on commonsense and experience in weighing these factors. The following factors are relevant in making a determination of the dispute before us.

1. Board certification and relevant collective-bargaining agreements

There is no evidence that Piledrivers has been certified by the Board as the collective-bargaining representative for a unit of the Employer's employees. While the record shows that the Employer has entered into project agreements with Piledrivers on four occasions since 1975, these contracts were specifically limited to the duration of each job. Further, the terms and conditions of employment set forth in those collective-bargaining agreements applied solely to employees that Piledrivers supplied to the Employer. It is also clear that the Employer has not executed any project agreement for the Lohmeyer jobsite. The Employer's present employees who have been assigned the disputed work are not represented by any labor organization.

Accordingly, we conclude that the factors of Board certification and relevant collective-bargaining agreements are inconclusive and do not favor an award of the disputed work to either group of employees.

2. The Employer's present assignment and past practice

Consistent with its practice on every project it has performed during the past 20 years, the Employer assigned the disputed steel sheeting and form carpentry work to its unrepresented employees. The Employer also has expressed a preference that such work continue to be performed by those employees. While the Employer in the past has used employees represented by Piledrivers in a few instances to supplement its regular work force, the evidence of these infrequent assignments does not warrant a finding that the Employer's past practice is inconclusive.

Thus, based on this evidence and the record as a whole, we find that the Employer's present assignment and past practice favor an award of the disputed work to its unrepresented employees.

3. Relative skills

It is clear from the record that the unrepresented employees of the Employer are capable of performing the steel sheeting and carpentry work in dispute to the Employer's satisfaction. The record also indicates, however, that employees represented by Piledrivers have done this work for the Employer on earlier projects. Accordingly, we find that this factor is inconclusive and does not favor an award of the disputed work to either group of employees.

4. Area practice

Mike Marinelli, the Employer's president, testified that, of approximately 100 area contractors who are engaged in operations similar to those being performed on the Lohmeyer project, there are only a few contractors who assign the disputed work to employees represented by Piledrivers and that most do not have unions representing any of their employees. Accordingly, on balance, we find that area practice favors awarding the disputed work to the Employer's unrepresented employees.

5. Efficiency and economy of operations

Under the present assignment of the disputed work, the Employer's unrepresented employees perform every function involved in its operations at this jobsite, except for certain work assigned to employees represented by Operating Engineers. The Employer therefore is able to use these employees not only on the disputed work but also on other work at the site and elsewhere as required by its various contracts with the city of Ft. Lauderdale. Piledrivers-represented employees, by contrast, are claiming only the steel sheeting and car-

[6] *Cement Masons Local 577 (Rocky Mountain Prestress)*, 233 NLRB 923, 924 (1977).

[7] *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961); *Machinists Lodge 1743 (J. A. Jones Construction Co.)*, 135 NLRB 1402 (1962).

pentry work at the Lohmeyer project. In this situation, employees represented by the Piledrivers may stand idle while the Employer's unrepresented employees are performing certain work that is not in dispute here. Thus, it is clear that the employment of piledrivers to perform a segment of this project would be unnecessarily disruptive of the Employer's work process.

Accordingly, we find that the factors of efficiency and economy of the Employer's operations favor awarding the disputed work to its unrepresented employees.

Conclusion

Upon the record as a whole, and after full consideration of all the relevant factors involved, we conclude that the Employer's unrepresented employees are entitled to perform the work in dispute. We reach this conclusion based on the Employer's present assignment, its past practice, area practice, and efficiency and economy of the Employer's operations. Accordingly, we shall determine the instant dispute by awarding the disputed work to the Employer's unrepresented employees. Additionally, we find that the Piledrivers is not entitled by means proscribed under Section 8(b)(4)(D) of the Act to force or require the Employer to assign the disputed work to employees represented by it.

Scope of the Award

The Employer urges that the Board issue "the broadest possible" award of the disputed work here. It contends that the Board's recent decision in *Carpenters IBC Local 1026 (McKinney Drilling), supra*, establishes that Piledrivers has a proclivity to engage in unlawful conduct in seeking work assignments from area employers. The Board previously has held that it will restrict the scope of its determination to a specific jobsite unless there is evidence that similar disputes may occur in the future.[8] With respect to the present dispute, we note that the Board has not previously determined jurisdictional disputes involving this Employer and Piledrivers. Furthermore, there is no evidence that Piledrivers has claimed similar work to be performed by the Employer in the future. Accordingly, we find the evidence insufficient to show a propensity by the Piledrivers to engage in similar disputes with the Employer in this area and therefore limit this determination to the particular controversy which gave rise to this proceeding.[9]

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. Employees of Intercounty Construction Corporation of Florida, Inc., who presently are unrepresented are entitled to perform the steel sheeting and carpentry work during the Employer's operations at the Lohmeyer project in Ft. Lauderdale, Florida.

2. Millwright, Piledrivers, Divers, Highway Construction, AFL-CIO, Local Union No. 1026, affiliated with the International Brotherhood of Carpenters and Journeymen of America, AFL-CIO, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Intercounty Construction Corporation of Florida, Inc., to assign the disputed work to employees represented by it.

3. Within 10 days from the date of this Decision and Determination of Dispute, Millwright, Piledrivers, Divers, Highway Construction, AFL-CIO, Local Union No. 1026, affiliated with the International Brotherhood of Carpenters and Journeymen of America, AFL-CIO, shall notify the Regional Director for Region 12, in writing, whether or not it will refrain from forcing or requiring Intercounty Construction Corporation of Florida, Inc., by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work to employees represented by it rather than to the Employer's unrepresented employees.

[8] See *Painters Local 636 (Plaza Glass)*, 214 NLRB 912, 915 (1974).

[9] Accord: *Teamsters Local 170 (Barletta Co.)*, 248 NLRB 1008, 1012 at fn. 6 (1980).